127780

STATE OF MICHIGAN

IN THE SUPREME COURT

BEVERLY HEIKKILA, Personal Representative for the Estate of Sheri L. Williams,

Respondent/Appellant/Plaintiff,

vs.

NORTH STAR STEEL COMPANY, a Minnesota corporation, MARC ROLLAND SEVIGNY, J.R. PHILLIPS TRUCKING, LTD., a Canadian corporation and INTERNATIONAL MILL SERVICE, INC., a Michigan corporation, Jointly and Severally,

Petitioners/Appellees/Defendants.

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Supreme Court Case No. 127780

Court of Appeals Case No. 246761

Lower Court Case No. 00-11135 NI

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NORTH STAR STEEL'S REPLY TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' APPLICATIONS FOR LEAVE OR OTHER PEREMPTORY ACTION

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INTRODUCTION

The attempt by plaintiff to convince this Court to deny review of the Court of Appeals' decision as to North Star Steel rests on the assumption of the very fact that she needs to prove: that the object which hit Ms. Williams was slag. For example, at page 33 of her brief, plaintiff attempts to distinguish this case from Moody v Chevron, 201 Mich App 232, 505 NW2d 900 (1993), app den, 447 Mich 979 (1994) because "while bees are ubiquitous in nature, the slag could only reasonably have come from one source." Having assumed that the object was slag, plaintiff argues that North Star's premises were littered with slag -- thus, according to plaintiff, establishing the nexus between the object that hit Ms. Williams and North Star Steel. There are only two things wrong with plaintiff's approach: plaintiff has admitted that she does not know and cannot prove that her decedent was hit by slag and, second, her factual position is not supported by the record evidence.

All of plaintiff's arguments regarding North Star Steel hang on a rope of sand.

Plaintiff's "theory of the case is that Sevigny's truck tires picked up a chunk of 'A scrap,' or slag, negligently left in the roadway of the NSS/IMS premises . . . ." However, plaintiff has repeatedly admitted in other briefs that no one has found the object that hit Ms. Williams and, therefore, no one knows what that object was. See, e.g., Plaintiff's Brief to the Court of Appeals, pp. 1 and 38. Moreover, plaintiff has also admitted that she does not know where or when the truck tires picked up the unknown object. See, e.g., Plaintiff's Brief to the Court of

Appeals, page 38. And, because of that, the trial court properly dismissed plaintiff's case. This Court should reverse the decision of the Court of Appeals.

GIVING PLAINTIFF EVERY BENEFIT OF EVERY DOUBT, SHE WILL NOT BE ABLE TO SHOW THAT ANY ACT OF NORTH STAR WAS A PROXIMATE CAUSE OF HER DECEDENT'S INJURIES

Surprisingly, plaintiff and North Star agree on the standard to be applied in determining whether plaintiff's case should be dismissed for failure to establish probable cause. "[A] plaintiff does not need to negate all other possible causes, but the evidence must exclude other reasonable hypotheses with a fair amount of certainty." Plaintiff's brief at page 26, relying on Skinner v Square D Co, 445 Mich 153; 516 NW2d 475 (1994), rehrg denied, 445 Mich 1233 (1994). Applying that standard, plaintiff's case must be dismissed.

Assume[1], as plaintiff claims, that an object was lodged between the wheels of Mr. Sevigny's truck; assume that the object was composed of steel; that the object was in the wheels when it left North Star's premises; that the object was launched from the wheels and hit Ms. Williams -- all as plaintiff claims. Still, any one of the following fact patterns is completely consistent with these assumed facts and none of them would support a cause of action against North Star Steel:

- A. As Mr. Sevigny drove his truck down the long east-west road on the North Star property, he ran over a steel part broken off another truck which had just preceded him down the road. That piece lodged in the truck's tires, made gouge marks in the road and ultimately flew out of the tires, hitting Ms. Williams.

- B. On his way to the North Star facility, Mr. Sevigny ran over a metal object in the road. The object lodged in his tires and remained there while he loaded his truck and left North Star. It made the gouge marks reported by the witnesses and later flew out of the tires and hit Ms. Williams.

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[1] For purposes of this portion of the brief, we will assume the veracity of every one of plaintiff's assertions. In the second part of this brief we will show that many of those assertions are not supported by the record.

- C. Moments before Mr. Sevigny went down that east-west road, his colleague, Mr. Rioux, went that way with a truckload of slag or A-scrap. One piece fell off his truck and Mr. Sevigny ran over it. The object lodged in the tires, made the gouge marks reported by plaintiff, and ultimately hit Ms. Williams.

- D. When Mr. Sevigny backed his truck into the slag pile to dump some of his load, a piece of slag lodged in his tires. It stayed there, made the gouge marks reported by the plaintiff, and ultimately hit Ms. Williams.

Each of these scenarios is perfectly consistent with all of the evidence AND with the assumptions made by plaintiff. None of them is less likely than the theory advanced by the plaintiff; under none of these fact patterns would North Star be liable;[2] and for these reasons dismissal was appropriate.

As discussed in North Star's Application, this Court, in Skinner, said:

> We want to make clear what it means to provide circumstantial evidence that permits a reasonable inference of causation. As *Kaminski* explains, at a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. **Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory**. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.

445 Mich at 164; emphasis added.

Applying the Skinner case to the foregoing, the lower court properly dismissed the plaintiff's complaint because plaintiff cannot show that any action (or inaction) of North Star was a proximate cause of plaintiff's decedent's death. The Court of Appeals' majority erred when it reversed the trial court.

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[2] In examples A and C, North Star would not be liable because it had no duty to follow the trucks around to be sure nothing fell off. At a minimum, North Star must have notice and an opportunity to retrieve any foreign objects in the roadway. See the discussion below. In examples B and D, North Star would have no liability because it certainly has no obligation to inspect Sevigny's truck. In addition, with respect to example D, the slag would have come from its appropriate location in the piles at the rear of the facility.

GIVING PLAINTIFF EVERY BENEFIT OF EVERY DOUBT, SHE WILL NOT BE ABLE TO SHOW THAT NORTH STAR BREACHED A DUTY

Assuming that North Star had a duty to maintain its premises and assuming that the object that hit Ms. Williams was slag, picked up on North Star's property, plaintiff still cannot establish a breach of duty by North Star and therefore plaintiff's case was properly dismissed. (Plaintiff does not discuss breach of duty by North Star in her brief.)

Plaintiff does not know when or how the slag allegedly got into the tires of Mr. Sevigny's truck and therefore plaintiff cannot show a breach of duty by North Star. As discussed in North Star's Application to this Court, before North Star can be found negligent, plaintiff must show that it had knowledge of the condition and an opportunity to cure it. American Airlines, Inc v Shell Oil Company, Inc, 355 Mich 151, 162; 94 NW2d 214 (1959).

As the examples above demonstrate, it is perfectly possible that the item that hit Ms. Williams came from the slag pile (where it was supposed to be) or from off-site or fell on the North Star roadway only a moment before Mr. Sevigny ran over it. There is no breach of duty by North Star under any of those scenarios. And since plaintiff cannot identify when or how the object found its way to Mr. Sevigny's tires, this case was properly dismissed by the trial court.

PLAINTIFF'S BRIEF IS RIFE WITH FACTUAL INACCURACIES

Space limitations prevent a thorough correction of plaintiff's misstatements but several should be highlighted.

Plaintiff repeatedly refers to the condition of the roads within the North Star facility as "debris littered" (page 1 of plaintiff's brief) and repeatedly refers to North Star's failure to keep the premises clean. For the most part, plaintiff supplies no citations to support her statements.

As noted in North Star's Application (at pages 13 and 14), only one witness (Dean Rioux) out of sixteen questioned, characterized the premises as anything but clean and well maintained. For example, plaintiff claims (page 9 of her brief) that Sevigny characterized the roads as messy, but his real testimony is quoted below:

> Q. You made a comment that around the IMS area there was a lot of slag on the roadway. Are you talking about the piles or are you talking about something else?
>
> * * * * *
>
> A. Sometimes when we went out there, there was some on the roadway, a little bit, but it's normal for a yard like that.
>
> Q. When you're talking about the roadway, what area are you talking about?
>
> A. Around the piles, like the little roads you got around the piles.
>
> Q. What about along this long roadway that's running from east to west? Would there have been slag on that?
>
> A. I don't remember. I don't remember seeing any.

Sevigny Deposition, pages 84 and 85. The testimony of Ron Cutter, a disinterested observer, is typical of the other deponents. He characterized the roads as "fairly clean."

> Q: It's not sparkling clean because it's a steel mill, right?
>
> A: Exactly, yes.
>
> Q: Have you ever been to other steel mills?
>
> A: Yes, I used to work at one at Ford at Flat Rock.
>
> Q: How does this compare?
>
> A: I got to say this is a lot cleaner than Michigan Castings. The truth is the truth, you know.
>
> * * *
>
> Q: North Star is a lot cleaner?

A; Oh, yeah.

Cutter deposition, page 30.

Plaintiff also has tried to suggest that no one at North Star cared about keeping the premises clean. For example at page 23 of her brief, plaintiff mis-characterizes the testimony of David Suttles:

> when he was asked who is *responsible* for keeping the roads clear of hazardous materials he incredibly answered "it's not my job to know."

In fact, the colloquy at the deposition was a little different:

> Q. (by plaintiff's counsel): It's your job to know who is responsible for keeping the roads clear of hazardous material; isn't that true?
>
> A. No, it's not my job to know.

Suttles deposition at page 29. After being asked directly "whose job it would be" to keep the roads clean, Mr. Suttles said that "most of the contract work to do things like that were either through the engineering department or the department superintendent that works in the area [sic]." Suttles also testified that "I've never seen big pieces of slag on that road." Deposition, page 33.

Plaintiff also stated that her expert, Scott Stoeffler, "submitted an affidavit" that the object that hit Ms. Williams was "consistent with the slag or "A" scrap Sevigny was hauling." Brief at page 29. Stoeffler's affidavit was attached to plaintiff's brief as Exhibit T; nowhere does he say that the object was consistent with slag or A-scrap. He does say that the object was likely made of "carbon or alloy steel" -- ingredients which are found in a great variety of items. There is no evidence, either in Stoeffler's affidavit or the attachment to it, that Mr. Stoeffler ever examined a piece of slag or characterized its components.

Finally, plaintiff's brief repeatedly discusses the gouge marks. She claims that the marks began on the "apron of the driveway" of North Star Steel (pages 1 and 2 of the brief); indeed, plaintiff claims that the marks began "42.5 feet inside NSS premises" (page 35 of the brief).

In fact, no witness ever testified to seeing gouge marks on North Star's property. David Suttles came closest; he testified that he saw circles painted on the roadway just inside North Star's gate. However:

Q: Did you ever actually see the grooves in the road - -

A: No.

Q: That the circles were around?

A: No.

Suttles deposition, page 63-64.

As noted in North Star's Application, the investigating officer, who discovered the gouge marks originally, and circled them with paint, was specifically asked whether there were any gouge marks "on the property of North Star." He answered "No." Ansel Deposition, page 67.

CONCLUSION

Monroe County Circuit Judge LaVoy got it right; so did Court of Appeals Judge Kelly. Because plaintiff cannot identify the object that hit her decedent and because she cannot identify

a breach of duty by North Star, this case was properly dismissed. The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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Dated: December 9, 2005

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